

§ 1.6038A-0

26 CFR Ch. I (4-1-13 Edition)

United States person may show reasonable cause by providing a written statement to the Commissioner's delegate having jurisdiction over the person's return to which the Form 8865 should have been attached, setting forth the reasons for the failure to comply. Whether a failure to comply was due to reasonable cause will be determined by the Commissioner, or the Commissioner's delegate, under all the facts and circumstances.

(5) *Statute of limitations.* For exceptions to the limitations on assessment in the event of a failure to provide information under section 6038, see section 6501(c)(8).

(1) *Effective date.* Except as otherwise provided, this section shall apply for tax years of a foreign partnership ending on or after December 31, 2000. For tax years of a foreign partnership ending before December 23, 2002, see § 1.6038-3(j) in effect prior to the amendments made by T.D. 9033 (see 26 CFR part 1 revised April 1, 2002).

[T.D. 8850, 64 FR 72550, Dec. 28, 1999, as amended by T.D. 9033, 67 FR 78175, Dec. 23, 2002; T.D. 9065, 68 FR 39012, July 1, 2003]

§ 1.6038A-0 Table of contents.

This section lists the captions that appear in the regulations under section 6038A.

§ 1.6038A-1 General requirements and definitions.

- (a) Purpose and scope.
- (b) In general.
- (c) Reporting corporation.
 - (1) In general.
 - (2) 25-percent foreign-owned.
 - (3) 25-percent foreign shareholder.
 - (i) In general.
 - (ii) Total voting power and value.
 - (iii) Direct 25-percent foreign shareholder.
 - (iv) Indirect 25-percent foreign shareholder.
 - (4) Application to prior open years.
 - (5) Exceptions.
 - (i) Treaty country residents having no permanent establishment.
 - (ii) Qualified exempt shipping income.
 - (iii) Status as a foreign related party.
 - (d) Related party.
 - (e) Attribution rules.
 - (1) Attribution under section 318.
 - (2) Attribution of transactions with related parties engaged in by a partnership.
 - (f) Foreign person.
 - (g) Foreign related party.
 - (h) Small corporation exception.

- (i) Safe harbor for reporting corporations with related party transactions of *de minimis* value.
 - (1) In general.
 - (2) Aggregate value of gross payments made or received.
- (j) Related reporting corporations.
- (k) Consolidated return groups.
 - (1) Required information.
 - (2) Maintenance of records and authorization of agent.
- (3) Monetary penalties.
 - (1) District Director.
 - (m) Examples.
 - (n) Effective dates.
 - (1) Section 1.6038A-1.
 - (2) Section 1.6038A-2.
 - (3) Section 1.6038A-3.
 - (4) Section 1.6038A-4.
 - (5) Section 1.6038A-5.
 - (6) Section 1.6038A-6.
 - (7) Section 1.6038A-7.

§ 1.6038A-2 Requirement of return.

- (a) Form 5472 required.
 - (1) In general.
 - (2) Reportable transaction.
- (b) Contents of return.
 - (1) Reporting corporation.
 - (2) Related party.
- (3) Foreign related party transactions for which only monetary consideration is paid or received by the reporting corporation.
- (4) Foreign related party transactions involving nonmonetary consideration or less than full consideration.
- (5) Additional information.
- (6) Reasonable estimate.
 - (i) Estimate within 25 percent of actual amount.
 - (ii) Other estimates.
- (7) Small amounts.
- (8) Accrued payments and receipts.
- (c) Method of reporting.
- (d) Time and place for filing returns.
- (e) Untimely filed return.
- (f) Exceptions.
 - (1) No reportable transactions.
 - (2) Transactions solely with a domestic reporting corporation.
 - (3) Transactions with a corporation subject to reporting under section 6038.
 - (4) Transactions with a foreign sales corporation.
- (g) Filing Form 5472 when transactions with related parties engaged in by a partnership are attributed to a reporting corporation.
- (h) Effective dates for certain reporting corporations.

§ 1.6038A-3 Record maintenance.

- (a) General maintenance requirements.
 - (1) Section 6001 and section 6038A.
 - (2) Safe harbor.

Internal Revenue Service, Treasury

§ 1.6038A-0

- (3) Examples.
- (b) Other maintenance requirements.
- (1) Indirectly related records.
- (2) Foreign related party or third-party maintenance.
- (3) Translation of records.
- (4) Exception for foreign governments.
- (c) Specific records to be maintained for safe harbor.
- (1) In general.
- (2) Descriptions of categories of documents to be maintained.
- (i) Original entry books and transaction records.
- (ii) Profit and loss statements.
- (iii) Pricing documents.
- (iv) Foreign country and third party filings.
- (v) Ownership and capital structure records.
- (vi) Records of loans, services, and other non-sales transactions.
- (3) Material profit and loss statements.
- (4) Existing records test.
- (5) Significant industry segment test.
- (i) In general.
- (ii) Form of the statements.
- (iii) Special rule for component sales.
- (iv) Level of specificity required.
- (v) Examples.
- (6) High profit test.
- (i) In general.
- (ii) Return on assets test.
- (iii) Additional rules.
- (7) Definitions.
- (i) U.S.-connected products or services.
- (ii) Industry segment.
- (iii) Gross revenue of an industry segment.
- (iv) Identifiable assets of an industry segment.
- (v) Operating profit of an industry segment.
- (vi) Product.
- (vii) Related products or services.
- (viii) Model.
- (ix) Product line.
- (8) Example.
- (i) Facts.
- (ii) Existing records test.
- (iii) Significant industry segments.
- (iv) High profit test.
- (v) Material profit and loss statements.
- (d) Liability for certain partnership record maintenance.
- (e) Agreements with the District Director or the Assistant Commissioner (International).
- (1) In general.
- (2) Content of agreement.
- (i) In general.
- (ii) Significant industry segment test.
- (iii) Example.
- (3) Circumstances of agreement.
- (4) Agreement as part of APA process.
- (f) U.S. maintenance.
- (1) General rule.
- (2) Non-U.S. maintenance requirements.
- (3) Prior taxable years.
- (4) Scheduled production for high volume or other reasons.

- (5) Required U.S. maintenance.
- (g) Period of retention.
- (h) Application of record maintenance rules to banks and other financial institutions. [Reserved]
- (i) Effective dates.

§ 1.6038A-4 Monetary penalty.

- (a) Imposition of monetary penalty.
- (1) In general.
- (2) Liability for certain partnership transactions.
- (3) Calculation of monetary penalty.
- (b) Reasonable cause.
- (1) In general.
- (2) Affirmative showing required.
- (i) In general.
- (ii) Small corporations.
- (iii) Facts and circumstances taken into account.
- (c) Failure to maintain records or to cause another to maintain records.
- (d) Increase in penalty where failure continues after notification.
- (1) In general.
- (2) Additional penalty for another failure.
- (3) Cessation of accrual.
- (4) Continued failures.
- (e) Other penalties.
- (f) Examples.
- Example (1)—Failure to file Form 5472.
- Example (2)—Failure to maintain records.
- (g) Effective dates.

§ 1.6038A-5 Authorization of agent.

- (a) Failure to authorize.
- (b) Authorization by related party.
- (1) In general.
- (2) Authorization for prior years.
- (c) Foreign affiliated groups.
- (1) In general.
- (2) Application of noncompliance penalty adjustment.
- (d) Legal effect of authorization of agent.
- (1) Agent for purposes of commencing judicial proceedings.
- (2) Foreign related party found where reporting corporation found.
- (e) Successors in interest.
- (f) Deemed compliance.
- (1) In general.
- (2) Reason to know.
- (3) Effect of deemed compliance.
- (g) Effective dates.

§ 1.6038A-6 Failure to furnish information.

- (a) In general.
- (b) Coordination with treaties.
- (c) Enforcement proceeding not required.
- (d) *De minimis* failure.
- (e) Suspension of statute of limitations.
- (f) Effective dates.

§ 1.6038A-7 Noncompliance.

- (a) In general.
- (b) Determination of the amount.

§ 1.6038A-1

26 CFR Ch. I (4-1-13 Edition)

- (c) Separate application.
- (d) Effective dates.

[T.D. 8353, 56 FR 28060, June 19, 1991]

§ 1.6038A-1 General requirements and definitions.

(a) *Purpose and scope.* This section and §§ 1.6038A-2 through 1.6038A-7 provide rules for certain foreign-owned U.S. corporations and foreign corporations engaged in trade or business within the United States (reporting corporations) relating to information that must be furnished, records that must be maintained, and the authorization of the reporting corporation to act as agent for related foreign persons for purposes of sections 7602, 7603, and 7604 that must be executed. Section 6038A(a) and this section require that a reporting corporation furnish certain information annually and maintain certain records relating to transactions between the reporting corporation and certain related parties. This section also provides definitions of terms used in section 6038A. Section 1.6038A-2 provides guidance concerning the information to be submitted and the filing of the required return. Section 1.6038A-3 provides guidance concerning the maintenance of records. Section 1.6038A-4 provides guidance concerning the application of the monetary penalty for the failure either to furnish information or to maintain records. Section 1.6038A-5 provides guidance concerning the authorization of an agent for purposes of sections 7602, 7603, and 7604. Section 1.6038A-6 provides guidance concerning the failure to furnish information requested by a summons. Finally, § 1.6038A-7 provides guidance concerning the application of the non-compliance penalty for failure by the related party to authorize an agent or by the reporting corporation to substantially comply with a summons.

(b) *In general.* A reporting corporation must furnish the information described in § 1.6038A-2 by filing an annual information return (Form 5472 or any successor), and must maintain records as described in § 1.6038A-3.

(c) *Reporting corporation—(1) In general.* For purposes of section 6038A, a reporting corporation is either a domestic corporation that is 25-percent foreign-owned as defined in paragraph

(c)(2) of this section, or a foreign corporation that is 25-percent foreign-owned and engaged in trade or business within the United States. After November 4, 1990, a foreign corporation engaged in a trade or business within the United States at any time during a taxable year is a reporting corporation. See section 6038C.

(2) *25-percent foreign-owned.* A corporation is 25-percent foreign-owned if it has at least one direct or indirect 25-percent foreign shareholder at any time during the taxable year.

(3) *25-percent foreign shareholder—(i) In general.* A foreign person is a 25-percent foreign shareholder of a corporation if the person owns at least 25 percent of—

(A) The total voting power of all classes of stock of the corporation entitled to vote, or

(B) The total value of all classes of stock of the corporation.

(ii) *Total voting power and value.* In determining whether one foreign person owns 25 percent of the total voting power of all classes of stock of a corporation entitled to vote or 25 percent of the total value of all classes of stock of a corporation, consideration will be given to all the facts and circumstances of each case, under principles similar to § 1.957-1(b)(2) (consideration of arrangements to shift formal voting power away from a foreign person).

(iii) *Direct 25-percent foreign shareholder.* A foreign person is a direct 25-percent foreign shareholder if it owns directly at least 25 percent of the stock of the reporting corporation, either by vote or by value.

(iv) *Indirect 25-percent foreign shareholder.* A foreign person is an indirect 25-percent foreign shareholder if it owns indirectly (or under the attribution rules of section 318 is considered to own indirectly) at least 25 percent of the stock of the reporting corporation, either by vote or by value.

(4) *Application to prior open years.* For taxable years beginning before July 11, 1989, the definition of a reporting corporation under this paragraph applies in determining whether a foreign-